CHAPTER 4

MILITARY LAW OF EVIDENCE

> Acting much like a filter, the law of evidence operates to separate that evidence or information which is worthy of being placed before the triers of fact from information which has no place before these jurors. Obviously, this is a gross oversimplification, but it conveys the basic idea underlying the law of evidence.
>
> —*Basic Military Justice Handbook*

The material discussed in this manual does not cover all the laws of evidence. The laws covered in this chapter are those needed to help you prepare a case and to make you aware of what to expect when a case goes to trial.

SOURCES OF THE LAW OF EVIDENCE

LEARNING OBJECTIVES: Identify and discuss the various sources for the law of evidence.

When speaking of "the law of evidence," one does not refer to a single set of laws contained in a particular book. Some of the major sources of the law of evidence are the Constitution, statutes, court rules, court decisions, scholarly writings, and administrative decisions.

THE CONSTITUTION

The chief focal point of our discussion of the law of evidence is its application in the military. Since the Navy is an arm of the Federal Government, the basic source for evidentiary law is, as expected, the U.S. Constitution.

Article I, Section 8 of the Constitution states: "The Congress shall have power. . . to make rules for the Government and regulation of the land and naval forces. . . ." For anyone familiar with the Constitution, this might seem odd, since Article III addresses itself to the judiciary. But military courts are Article I courts—not Article III courts. In other words, military courts derive their existence, at least indirectly, from Article I of the Constitution, whereas a Federal District court, which might try a criminal case, derives its power from Article III of the Constitution.

THE UNIFORM CODE OF MILITARY JUSTICE

Congress enacted the *Uniform Code of Military Justice (UCMJ)* Under Article I, Section 8 of the Constitution. The *UCMJ* contains a number of articles dealing with evidentiary matters, but Article 36 is the key to the military law of evidence. Article 36 of the *UCMJ* vests the President of the United States with the power to prescribe rules of evidence for the Armed Forces.

THE MANUAL FOR COURTS MARTIAL

The President has prescribed the rules of evidence in the *Manual for Courts-Martial (MCM).* Change 5 is the latest revision to the *MCM,* issued in November 1991. This is the most significant change concerning the rules of evidence. It adopts a new body of rules similar to the Federal Rules of Evidence. These new rules, called Military Rules of Evidence (MRE), are found in Chapter 27 of the *MCM.* They have long been the primary source of evidentiary rules in the military. Although the bulk of evidentiary rules are set forth in Chapter 27, other chapters of the MCM also deal with matters related to the law of evidence.

The MCM may not be able to interpret each point of the law relating to evidence. Such interpretation is a continuing process. Therefore, the Courts of Military Review (CMR) and Court of Military Appeals (COMA) were established to interpret points of law on particular issues. In effect, then, they have the function of making new law through their interpretation of existing law. If a point of law is not covered in the MCM, or if it is not clear, in many instances military trial courts will be able to refer to the decisions of the CMR or COMA. Therefore, in addition to the MCM, the military judicial system itself is a source of the law of evidence.

OTHER SOURCES

Finally, other sources of the law of evidence are to be found in Federal Court decisions interpreting rules of evidence; opinions of the Judge Advocate General; various administrative publications such as *Navy Regulations,* the *Manual of the Judge Advocate General of the Navy, the Naval Military Personnel Manual,* and various orders and instructions; the decisions of State courts; and scholarly works on evidence.

APPLICABILITY OF THE RULES OF EVIDENCE

LEARNING OBJECTIVES: Explain how the rules of evidence apply at trial and in nonjudicial punishment proceedings.

In a trial, the rules of evidence may well determine whether or not the accused is convicted or acquitted. Without the rules of evidence, the outcome of trials would be inconsistent and the courtroom in chaos. Thus, these rules, which some choose to call "technicalities," are necessary for fairness, both to the government and to the accused.

The Military Rules of Evidence (MRE) do not apply to proceedings conducted under Article 15, *UCMJ*. However, paragraph 133b(3) of the MCM requires that the accused be advised of his or her rights against self-incrimination (Art. 31b) at mast or office hours. Although the MRE do not apply in nonjudicial punishment proceedings, the commanding officer should be assured that the information that provides the basis for imposition of nonjudicial punishment is reliable. But rule 101 of the Military Rules of Evidence does make the rules applicable to general, special, and summary courts-martial.

The purpose of a trial is to decide the "ultimate issue"; that is, the innocence or guilt of the accused with regard to particular charges and specifications. To resolve this issue, the government has the burden of proving the accused's guilt beyond a reasonable doubt by the introduction of facts.

Besides the ultimate issue of guilt or innocence, there are other issues that will arise at trial. For example, one right of the accused is to have access to the files of the government that pertain to his or her case. The law of evidence operates to guarantee that this right is observed. If the government has not allowed the defense to examine these files, the government may be prevented from introducing this information at trial.

Thus, without the law of evidence, the criminal trial as we know it would be a very disorderly proceeding. Without it, information received at trial would be unreliable, and many of the rights afforded an accused in a criminal proceeding would be denied.

POINTS OF INTEREST

LEARNING OBJECTIVES: Describe the two major points of interest in a case. Define corpus delicti. Explain how intent, drunkenness, and negligence may affect the outcome of a trial. Describe the concept of presumption of innocence.

In every court proceeding, the prosecution must produce evidence to prove the following two major points, which constitute the issue in a case:

1. The offense charged was actually committed.

2. The person accused committed the illegal act.

Certain other elements also must be proven in some cases. For example, consider a case of larceny in which the accused is charged with stealing certain personal goods of value. The other element that must be proven is that the articles were taken fraudulently with the intent to permanently deprive the owner of possession.

CORPUS DELICTI

A consideration of the meaning of *corpus delicti* becomes necessary at this point, because some people usually think of a murder victim when anyone uses this term. A commonly accepted definition of *corpus delicti* is "the body or substance of a crime." As the term is used and understood today, this definition is not accurate. The definition has a broader meaning. *Corpus delicti* is applicable to the substantial and fundamental fact or facts connected with the actual commission of an illegal act (civil or criminal). For example, in the theft of a watch, the corpus delicti is the taking of the watch.

Usually the corpus delicti is proven by the prosecution at the start of a case, because without it, there is no offense. In certain instances, courts permit changes in the normal sequence in which evidence is introduced. Notwithstanding such a change in

procedure, the prosecution must always prove that the accused is the same person named in the indictment, charges and specifications. Usually the requisite proof is afforded by the testimony of people who know the accused. Next, the prosecution must prove, with the testimony of the witnesses, that the accused committed the crime.

INTENT

In some crimes, intent must be proven as a separate fact apart from the crime. Such crimes are murder, larceny, burglary, desertion, mutiny, and the like. In certain other crimes, the law holds that the crime itself shows intent existed. In this group are rape, sleeping on watch, drunkenness, neglect of duty, and so on.

DRUNKENNESS

Drunkenness may be admitted for consideration if it tends to show a mental or physical incapacity on the part of a person to plan or carry out a specific intent to commit an offense. The nature of some crimes is such that deliberate intent and careful planning may be beyond the ability of a person who is drunk. Such crimes are larceny, robbery, and burglary. For instance, a drunk person charged with robbery might have the charge reduced to one less serious, such as battery or trespassing. Similarly, in a murder case, proof of drunkenness might reduce the crime to manslaughter. Proof of drunkenness at the time the crime was committed may be introduced not to excuse or lessen the seriousness of the homicide, but to aid the court in deciding whether the accused is guilty of the crime charged or of one less serious in nature.

On the other hand, a statute may be so framed as to make the act of rape, assault and battery, or arson criminal, whether or not there was intent to break the law. Evidence that the accused was drunk would not, therefore, constitute a defense for the commission of any of these acts.

NEGLIGENCE

If a man kills another, proof of negligence may be sufficient to support a conviction without regard to intent. To avoid criminal responsibility, such a person must have used the same care and caution that a man of ordinary foresight would have used under similar conditions. The courts are very strict in interpreting what constitutes ordinary caution, particularly in regard to firearms.

PRESUMPTION OF INNOCENCE

The law presumes the accused is innocent until he or she is proven guilty. In a civil action, the plaintiff must prove his or her case by a preponderance of the evidence; whereas in a criminal case, his or her guilt must be proven beyond a reasonable doubt. The burden of proving a case (recovery or a ground of defense) is upon the person who makes the accusation and takes action to introduce the matter for trial before a judicial tribunal. The burden of proof remains to the end of the case with the party who has it at the beginning of the trial. The accused is never required to assume the burden of proof to show innocence. In minor issues, however, such as when the accused objects to the testimony introduced by the prosecution, the accused must assume the burden of proving that his or her objection is valid.

FORMS OF EVIDENCE

LEARNING OBJECTIVES: List and explain the three basic forms of evidence. Define demonstrative evidence.

Evidence can be divided into at least three basic forms: oral, documentary, and real. A special form of evidence called demonstrative will also be discussed in this section.

ORAL EVIDENCE

Oral evidence is the sworn testimony received at trial. The fact that an oath is administered is some guarantee that the information related by the witness will be trustworthy. If the witness makes statements under oath that are not true, he or she may be prosecuted for perjury. There are, however, other forms of oral evidence. For example, if a witness makes a gesture or assumes a position to convey information, this, too, is a form of oral evidence from the standpoint of a broad definition of the term. Generally, witnesses will be able to relate what they actually observed, heard, smelled, felt, or experienced, either through oral testimony or by acting out what they know as a result of their sensory perceptions.

DOCUMENTARY EVIDENCE

Documentary evidence is usually a writing that is offered into evidence. For example, an accused is

charged with making a false report. The government, to prove its case, would want to introduce the report in evidence. Another example could be when a servicemember is absent from his or her command. To prove that he or she was absent, the government would introduce an entry from the accused's service record as proof of this fact.

Documentary evidence includes letters, telegrams, printed matter, photographs, charts, and the like. It must be both material and relevant, and its use is governed by certain rules, as pointed out in the next three topics.

General Requirements for Documentary Evidence

The following is a listing of general requirements for documentory evidence:

1. The genuineness of every document must be proven. Authentication of a writing maybe provided by having its author appear as a witness, calling a witness who was present when it was signed, or calling one who can identify the handwriting.

2. In proving the contents of a writing, the original of the writing is the best evidence of its contents and must, therefore, be introduced (except in certain situations). When an admissible writing has been lost or destroyed or cannot be produced, the contents may be proven by an authenticated copy or by the testimony of a witness who has seen and can remember the writing.

3. When documentary evidence is lengthy, the court (to save time) may permit a witness who has studied the papers to attest to their meaning. The opposing party, of course, has the right to examine the documentary evidence and to cross-examine the witness.

4. Unofficial charts, sketches, diagrams, plans, notes, or drawings representing items that cannot be described clearly and easily by a witness are admissible when proven to be authentic. Proof that such a piece of evidence is a true and accurate representation is sufficient.

5. The terms of a written document cannot be altered by oral testimony. Oral testimony intended to explain the meaning of a document, however, is admissible.

6. Documentary evidence must be introduced by presenting it to the court and identifying it.

7. Official documents of the Department of Defense are assumed to be genuine.

8. A document must be offered in full. Even though only a part of it is read to the court, the entire document must be received in evidence.

9. A desired document that is not in the possession of the party wishing to introduce it may be produced in court by serving a *subpoena* on the holder.

Records and Registers

The following rules apply to the admissibility of records and registers:

1. Properly authenticated copies of government records are admissible in lieu of the originals.

2. An official chart is admissible as an official record.

3. Entries and records of an organization (such as attendance reports, muster sheets, and hotel registers) are admissible, provided it is the practice of such organization to keep such records in the regular course of business.

Letters, Telegrams, and Photographs

The following rules apply to the admissibility of letters, telegrams and photographs:

1. A letter or telegram written, dictated, or signed by the accused may be submitted as evidence.

2. A letter or telegram sent to the accused is admissible only if it can be shown that he or she answered or acted upon it.

3. The original telegram filed with the sending office should be offered to the court. If the original is lost or destroyed, the received copy can be submitted.

4. Photographs and X-rays that are proven to be true pictures are admissible.

REAL EVIDENCE

Real evidence is any physical object that is offered into evidence. Real evidence includes all objects that are relevant and material to the issue, in addition to the testimony of witnesses and written documents. For example, a murder weapon, such as a pistol, would be real evidence. Now let's look at one more form of evidence, called demonstrative evidence.

DEMONSTRATIVE EVIDENCE

Demonstrative evidence is a hybrid or combination form of evidence. The old "personal view" principle has not been scrapped. This principle permits the jurors to view the scene of the act or happening, and thus obtain firsthand evidence to assist them in reaching a decision. Because of the complexity of the machinery of justice, however, the personal view becomes less and less practical. But if the court considers personal view desirable, it may adjourn to the scene of the offense.

As a means of presenting to the jury factual evidence concerning the issues, the courts today find it expedient to permit a witness to explain his or her testimony by introducing photographs, maps, models, or diagrams. The courts look upon such evidence as being more helpful in some respects than the testimony of human witnesses.

Evidence in this form, partly documentary and partly real, is called demonstrative evidence and is frequently categorized separately from the three basic forms of evidence.

TYPES OF EVIDENCE

LEARNING OBJECTIVES: List and explain the two types of evidence. Determine when circumstantial evidence is admissible and when it is inadmissible.

At trial, any form of evidence may be introduced to prove or disprove a fact either directly or circumstantially. We will now consider evidence known as *direct evidence* and *circumstantial evidence.* These two types of evidence may take any of the forms already discussed.

DIRECT EVIDENCE

Direct evidence is evidence that applies directly, without referring to other inferences, to prove or disprove a fact in issue. For example, a confession from the accused that he or she perpetrated the alleged offense is direct evidence that he or she did it.

CIRCUMSTANTIAL EVIDENCE

Circumstantial evidence, on the other hand, is evidence that tends to establish a fact from which a fact in issue may be inferred. For example, a pistol found at the scene of the crime and inscribed with the name "Able B. Seaman" is only circumstantial evidence that he was ever at the scene or that the pistol is his. The pistol may not belong to Able B. Seaman; or if the pistol is his, it may have been lost or stolen.

Circumstantial evidence is **NOT** inherently inferior to direct evidence. If the trier of fact is convinced of the accused's guilt beyond a reasonable doubt, the fact that all evidence was circumstantial will not dictate an acquittal.

Admissible Circumstantial Evidence

The following case illustrates competent circumstantial evidence that would be acceptable by a court. SN Jack R. Frost is charged with stealing clothes from the locker of QM3 Pistol.

1. The clothes were taken while Pistol was at drill. No one was seen near his locker.

2. Because Frost was detailed as a foodhandler, he was not at drill. For a short while, however, he was absent from his duty as foodhandler, during which period the clothes disappeared.

3. Frost was known to be without money the day before the theft occurred. That evening he left the barracks with a bundle under his arm, and later was seen to enter a certain house. Later the same night, he had money in his possession.

4. When the house was searched the next day, most of the missing clothes were found.

Inadmissible Circumstantial Evidence

The courts would not allow the following types of circumstantial character evidence to be admitted for the purpose of proving the conduct of the accused. These examples of circumstantial evidence are inadmissible because they are unreliable. In general, this is true whether the case is civil or criminal.

- The accused is disliked by his shipmates.
- A number of thefts have occurred aboard the ship, and the general belief is that the accused was connected with them.
- He was tried before for the theft of clothes, and convicted.
- He is suspected of being a deserter from a foreign navy.

- He comes from a poor district where petty thievery is common.

ADMISSIBILITY OF EVIDENCE

LEARNING OBJECTIVES: Describe three major factors that determine the admissibility of evidence. Define prima facie evidence. Explain the concept of reasonable doubt. Determine when similar facts and other offenses are admissible at trial. Define hearsay evidence and explain two exceptions to the hearsay evidence rule.

Apart from the forms and types of evidence, certain matters will be admitted into evidence and others will not.

Admissibility depends upon several factors: (1) authenticity, (2) relevancy, and (3) competency. For evidence to be admissible, it must meet each qualification or test discussed in the following paragraphs.

AUTHENTICITY

The term *authenticity* refers to the genuine character of the evidence. Authenticity simply means that a piece of evidence is what it purports to be. Let's consider the three forms of evidence.

First, with regard to oral evidence, consider the testimony of a witness. We know that his or her testimony is what it purports to be by virtue of the fact that he or she has taken an oath to tell the truth, the whole truth, and nothing but the truth. He identifies himself as John Boate, and therefore, this is John Boate's testimony.

Next, consider apiece of documentary evidence—a service record entry, for example. How do we know that the service record entry is what it purports to be? Sometimes the custodian of the record, the personnel officer, will be called to "identify" the service record entry. The personnel officer will testify under oath that he or she is the custodian of the record, that he or she has withdrawn a particular entry or page from the service record, and that the evidence is, in fact, that entry or page. Again, it is established that the service record entry is what it purports to be.

Last of all, with regard to real evidence, take, for example, a weapon that was recovered from the person of the accused as the result of a search by an MA. The MA is called and sworn as a witness. He or she gives testimony with regard to the circumstances of the search. Finally, the MA is presented with the weapon, and identifies it, perhaps from an identifying mark on the weapon or perhaps from a tag he or she attached to the weapon at the time it was seized. His or her testimony establishes that the weapon is what it purports to be.

Testimony is not the only way to authenticate certain types of evidence. For example, in the case of documentary evidence, a certificate from the custodian may be attached to a particular piece of documentary evidence. This attesting certificate establishes that the document is what it purports to be, An attesting certificate is a certificate or statement signed by the custodian of the record. It indicates that the writing to which the certificate or statement refers is a true copy of the record. The attesting certificate also indicates that the signer of the certificate or statement is the official custodian of the record. Once it is admitted in evidence, the certificate takes the place of a witness. In effect, the certificate speaks for itself. Of course, another way to achieve authentication is to have the trial counsel and the defense counsel agree that a certain item sought to be introduced into evidence is what it purports to be. The accused must consent to the agreement. This type of agreement is called a "stipulation," which must be accepted by the court in order for it to be effective in the case.

RELEVANCY

The term relevancy means that the information must reasonably tend to prove or disprove any matter in issue. The question or test involved is, "Does the evidence aid the court in answering the question before it?"

To understand the meaning of relevancy, consider a situation in which an accused is charged with theft of property of the United States. In most cases, the fact that the accused beat his wife regularly would probably have nothing to do with his theft of property of the United States. Therefore, any testimony to that effect would be objectionable as being irrelevant.

COMPETENCY

Competent as used to describe evidence means that the evidence is relevant and not barred by any exclusionary rule. Competent evidence is admissible as fit and appropriate proof in a particular case.

Several other considerations also determine competency. They are as follows:

Public policy. First, the evidence sought to be introduced must not be obtained contrary to public policy. The exclusionary rule is a recognition by the courts that in certain instances there is a public policy that requires the exclusion of certain evidence because of a counterbalancing need to encourage or prevent certain other activity or types of conduct. Additionally, this concept acts to further certain relationships at the expense of excluding certain evidence; for example, the husband-wife privilege precludes under certain circumstances the calling of one spouse to testify against the other. Similar privileges protect the relationships of attorney-client and clergyman-penitent. There is no such protection afforded in military law to a doctor and patient.

Reliability. A second exclusionary factor that relates to competence is reliability. Evidence that is hearsay (an out-of-court statement offered in court for the proof of its contents) is inadmissible. Hearsay evidence will be discussed later in this chapter. Exceptions to the hearsay rule are allowed only where the circumstances independently establish the reliability of the evidence. With respect to documentary evidence, the rules have been previously discussed. These rules exist with one purpose in mind: evidence that is offered must be reliable.

Undue prejudice. The third consideration with regard to competence rests in the area of undue prejudice. Here, such matters as prior convictions and inflammatory matters may not be received in evidence in order to prove or disprove an issue at trial.

Therefore, competency is a test of whether or not something is admissible; but, more than that, it is a matter of whether or not the evidence can meet the three tests outlined above—public policy, reliability, and undue prejudice.

PRIMA FACIE EVIDENCE

Prima facie evidence may be defined as "evidence that is good and sufficient, on its face, to meet the issue if no other testimony is offered." The prosecution establishes a prima facie case by introducing enough evidence to outweigh the general presumption that the accused is innocent. A prima facie case can be overthrown only when the accused introduces sufficient evidence in rebuttal; that is, evidence that contradicts or meets the evidence of the prosecution.

You must keep in mind that a prima facie case has no effect on the burden of proof, though it satisfies that burden for the time being. In addition, it calls upon the adverse party to introduce sufficient evidence to counteract or meet the prima facie case made against an accused.

The question of the court at the end of the trial is always: "Has the prosecution proven the guilt of the accused beyond a reasonable doubt?" Notice that it is not: "Has the accused been proven innocent?"

REASONABLE DOUBT

Reasonable doubt means an honest and real doubt caused by insufficient proof. It is not a doubt caused by a fault-finding attitude. Nor is it brought on by sympathy for the accused or for the accused's family. Proof beyond reasonable doubt is not proof beyond the possibility of mistake. The doubt must be based on reason, and it must be reasonable in view of all the evidence. If, after considering all the evidence impartially, the court feels it is dissatisfied or has an honest misgiving that the defendant is guilty, then reasonable doubt exists. To find the accused guilty, the court must be morally certain that the accused is guilty.

SIMILAR FACTS

Evidence of similar facts maybe introduced where the similarity between the facts is so close that there is practically no difference. For example, if a man is apprehended for speeding, the fact that he had been speeding on the same day a mile away would be inadmissible evidence. But evidence that he was driving at 60 miles per hour a moment before at a point very close to where he was apprehended would be admissible, because there is reasonable probability that his speed was maintained. Similarly, in a case involving drunkenness, it may be shown that the accused had been drinking shortly before the time specified, but a statement that the accused often was drunk in the past would not be admissible.

OTHER OFFENSES

Evidence of other offenses or acts of misconduct of the accused may be introduced when it tends to (1) identify the person as the perpetrator of the offense charged, (2) prove a plan or design of the accused, and (3) prove guilty knowledge or intent, if guilty knowledge or intent is an element of the offense.

For example, a man was being tried for claiming as real an imitation diamond he was pawning. Evidence that he shortly before had tried to pawn other imitation gems was admitted. This evidence is an exception to the rule that a different crime, not connected with the one alleged in the specification, cannot be brought out in evidence. Another example: A male defendant is charged with obtaining money from a female by marrying her. He obtained her money on a representation that he would invest it for her, and then he absconded. Evidence that he had pursued the same course with three other female acquaintances is admissible.

HEARSAY EVIDENCE

Hearsay testimony is secondhand evidence; it is not what the witness knows personally, but what someone else told him or her. *Scuttlebutt* is an example of hearsay. In general, hearsay may not be admitted in evidence, but there are exceptions. For instance, if the accused is charged with uttering certain words, a witness is permitted to testify that he or she heard the accused speak them.

The following examples illustrate hearsay that is inadmissible:

1. SN Water, the accused, is being tried for desertion. BMC Boate cannot testify that BM3 Christmas told him that SN Water said he (Water) intended to desert.

2. The accused is being tried for larceny of clothes from a locker. A testifies that B told him that she saw the accused leave the space where the locker was located with a bundle of clothes about the same time the clothes were stolen. This testimony from A would not be admissible to prove the facts stated by B.

Neither BMC Boate nor A would be allowed to testify, but the trial counsel could call BM3 Christmas and B as witnesses. The fact that hearsay evidence was given to an officer in the course of an official investigation does not make it admissible. Now let's look at two exceptions to the rules for hearsay evidence: dying declarations and *res gestae.*

Dying Declarations

Dying declarations of a victim that relate to facts surrounding the act that caused his or her dying condition are excepted from the hearsay rule. Such declarations are admissible in homicide cases. To be admissible as a dying declaration, the declaration must have been made while the victim was at the end of life (extremity) or under a sense of impending death and without hope of recovery.

In most jurisdictions, if the statement is to be introduced at a trial for criminal homicide, the person making the declaration must actually have died. If that person did not die, he or she would, of course, appear as a witness. A transcript of oral evidence of the dying declaration of the victim is admissible and may be repeated in court provided it is shown that the person knew that he was dying when the declaration was made, that the statement pertained to his own homicide, and that he was competent to testify. In the trial of A for murder, for example, the statement the deceased made, a few minutes before his death, that A shot him will be held admissible.

Res Gestae

Still another exception to hearsay testimony comes under the heading of *res gestae. Res gestae* are involuntary exclamations or acts made at the time the offense was committed and are so closely connected to the main fact in issue as to be a part of it. These utterances or acts are not planned, but are forced from the individual by the excitement of the moment. The ground of reliability upon which such declarations are received is their spontaneity; they are the facts talking through the party.

Res gestae also cover matters of identification. If a man witnesses a killing, for example, and afterwards sees the accused and, without thought, asserts: "There's the man who did the killing," his remark would be admissible.

COURT PROCEEDINGS

LEARNING OBJECTIVES: Determine the order in which evidence is presented in court, Describe the methods used to bring witnesses to court, and who may testify in court. Define credibility of a witness. Explain disqualification and impeachment of a witness. Identify the difference between depositions and affidavits.

We will now discuss some of the court procedures that you will find helpful when preparing an investigation. A working knowledge of court proceedings will also help if you have to appear in court.

ORDER OF EVIDENCE

Evidence is introduced first by the prosecution, then by the defense. Next, the prosecution rebuts the defense evidence. In conclusion, the defense has its surrebuttal. The court, in the interest of justice, may allow new evidence to be introduced at any time before it brings in a verdict.

During the rebuttal, the prosecution may introduce evidence to explain or contradict the evidence brought forward by the defense. The evidence of defense witnesses may be impeached (its truth questioned), or the truthfulness of the prosecution witnesses may be upheld. In the surrebuttal, the defense tries to discount the evidence brought out in the rebuttal.

Witnesses always are examined separately; no witness is allowed to be present in court while another witness is testifying. This practice, of course, does not apply to the accused, the trial counsel, the defense counsel, or members of the court, should they testify. Objection to a witness on the grounds of incompetence is made before he is sworn. The court decides whether such an objection is valid. Similarly, when the opposing side objects, the court rules on the admissibility of any question asked a witness.

ATTENDANCE OF WITNESSES

The attendance of witnesses is obtained by serving them a subpoena. This method of calling witnesses applies to civilians appearing before any judicial body appointed to inquire into the truth of a matter of general interest.

Any court-martial can require any member of the Armed Forces to appear before it as a witness. If the witness is stationed near the location of the court (so that travel at government expense is unnecessary), the trial counsel customarily notifies the witness, orally or in writing, of the date and place of the trial. To assure the attendance of the witness, his or her commanding officer should be advised informally. If a formal notice is required, the trial counsel makes a request to the commanding officer of the witness to ensure his or her appearance.

If the witness is not stationed close to the location where the court-martial will convene, the commanding officer will issue orders for travel at government expense to the trial. If practicable, a request for the attendance of a military witness is made in ample time to allow notice of at least 24 hours before the court convenes.

The trial counsel is authorized to subpoena as a witness, at government expense, a civilian in the United States or its territories and possessions, and can compel the civilian's attendance at the trial. If practicable, a subpoena is issued at least 24 hours before the time the witness must travel from home to comply with the subpoena.

The trial counsel, the defense counsel, and the court-martial are given equal opportunity to obtain witnesses. The trial counsel takes timely and appropriate action to provide for the attendance of those witnesses who have personal knowledge of the facts at issue in the case, both for the prosecution and for the defense.

WHO MAY TESTIFY?

The greater portion of the law of evidence is concerned with the rules that gradually have grown up in the courts respecting persons who may testify, and the manner in which their testimony may be given. Keep in mind that the sole objective of the rules of evidence is to arrive at the truth. A witness testifies regarding his or her knowledge of the facts as a matter of public duty, and only with the imposition of conditions the law authorizes. An example of an unauthorized condition would be an agreement to pay a witness additional compensation exceeding that authorized by law for his or her testimony.

Accused and Accomplice

The accused is allowed to testify if he or she desires. But the accused can never be forced to testify. If the accused elects not to take the witness stand, no comment may be made on this fact. The Constitution provides that no one may be compelled to testify against himself or herself.

An accomplice is always competent to testify although he or she cannot be required to answer questions when the answers might be incriminating. When an accused or accomplice testifies, the court, when deciding the creditability of the testimony, will carefully consider the evidence given.

Counsel

The trial counsel or the counsel for the accused may testify when his or her testimony is desired.

Children

The admissibility of testimony from a child is governed not by the child's age but by the child's sense and understanding of the facts and by his or her understanding of the importance of telling the truth.

Husband and Wife

The rules governing certain restrictions on the testimony of husband and wife are as follows:

1. The wife or husband of an accused may testify for the accused without restriction, but the witness may be cross-examined by the trial counsel.

2. The wife or husband of an accused may not be called to testify against the accused without the consent of both the accused and the witness unless the offense was committed by the accused against the witness.

3. A wife or husband may not testify to confidential communications received from the other unless the other gives consent.

CREDIBILITY OF A WITNESS

The *credibility of a witness* is his or her worthiness of belief, determined by the following considerations: Character, acuteness of powers of observation, accuracy and retentiveness of memory, general manner in giving evidence, relation to the matter before the court, appearance, deportment, and prejudices, general reputation for truth in his or her community, a comparison of his or her testimony with other statements made by him or her out of court, and a comparison of his or her testimony with that of others.

The creditivity of a witness may be attacked in cross-examination, or by evidence, to show that the witness has a bad reputation for truthfulness. Evidence that he or she was convicted in court of a crime involving moral turpitude and, particularly, perjury may be admitted. Testimony may be introduced to the effect that the witness has a bad reputation for truthfulness in his or her community or place of employment, and his or her reputation is considered to be a matter of fact. Testimony concerning his or her character is not allowed, because the law holds that this is a matter of opinion.

DISQUALIFICATION OF A WITNESS

Insanity or intoxication may disqualify a witness insofar as such condition affects the validity of the testimony. A witness proven senseless with drink at the time of the happening for which testimony is desired is barred on the grounds of intoxication. A witness suffering from mental infirmity is nevertheless competent to testify if the witness understands the moral importance of telling the truth and has the mental capacity to observe, remember, and describe accurately the facts under inquiry. The court (judge or law officer) decides whether a witness is competent to testify.

IMPEACHING A WITNESS

The testimony of a witness may be impeached in any of three ways:

- The facts to which the witness testifies may be disproved.
- It may be proved that the witness made contradictory statements during the present trial.
- An attack may be made on the witness' general credibility (worthiness of belief).

In impeaching a witness for making contradictory statements, he must be asked specifically if he made the contradictory statement just read to him. He cannot be asked, merely, if he made a different statement. Also, the contradictory statements must have been made during the current trial.

As a rule, although the side that called the witness may introduce evidence of a contradictory nature, it may not impeach him or her. An exception to this rule is made when (1) the witness appears to be hostile to the side that called him or her, or (2) counsel who called the witness, because of the nature of the case, had to call the witness but was surprised by his or her testimony.

DEPOSITIONS AND AFFIDAVITS

The testimony of a witness, as a general rule, is given orally. Necessity may, however, require that testimony be given by deposition. It is well to remember that after the action begins (charges have been signed), any deposition permitted to be taken stands on the same footing as testimony at a trial. What, then, is a deposition? A *deposition* is a written declaration, under oath or affirmation, made by a witness in the presence of the

adverse party so that necessary cross-examination may be made.

A deposition must be taken in the presence of a competent official, usually a court officer or notary public. If a crime is committed or injury or damage occurs, parties concerned find it advisable to have the testimony of various witnesses reduced to writing as prospective evidence in later legal actions. From the standpoint of accuracy alone, depositions are helpful. A witness who testifies immediately after an event takes place is more likely to remember the facts than some months later. Because the witness is placed under oath and because there is an opportunity for cross-examination, depositions are not in violation of the hearsay rule.

An *affidavit* differs from a deposition in that it is a statement made without giving the other side an opportunity to ask questions of the declarer. Although an affidavit is a sworn statement, it ordinarily is inadmissible in evidence of the truth of matters therein stated, because it is a *hearsay* statement and is one-sided. Exceptions may be made in affidavits dealing with certain issues, such as character of the accused, loss of an original document, or matters in extenuation of a possible sentence, unless such exceptions appear to affect injuriously the substantial rights of the parties.

Testimony given in a former trial of the accused may be admitted if the accused had been tried on substantially the same charges. Also, such testimony is admissible if it can be proven that the witness cannot attend the present trial because he or she is dead, very ill, insane, or that he or she is prevented by the accused from attending. However, the mere fact that the witness is now beyond the jurisdiction of the court or that his or her whereabouts are unknown does not render such former testimony admissible.

EXAMINATION PROCEDURE

LEARNING OBJECTIVES: State the order in which witnesses are examined. Define leading-, double-, and forbidden questions. State the general rule regarding opinions and describe when notes can be used in court. Explain verification of testimony and weighing of evidence. Describe the cross-examination technique used in court.

The examination of a witness proceeds as follows: First, the direct examination by the party who called him; second, cross-examination by the opposite party; third, redirect examination; fourth, re-cross-examination. The court may allow additional interrogation of a witness if further questioning is desirable.

All facts desired by the party who called the witness should be brought out in the direct examination. Objection may be raised by the other side if an attempt is made to bring out additional facts at a later time in the trial. On taking the stand, the witness must identify himself and (if possible) the accused.

LEADING QUESTIONS

Leading questions usually are not allowed on direct examination. *Leading questions* are questions that either suggest the answer desired of the witness or, embodying a material fact, are susceptible of being answered by a simple yes or no. A leading question, except on cross-examination, should be excluded upon proper objection. For example, if a knife is introduced in evidence, a witness should not be asked on direct examination whether it is the knife with which he saw the accused stab A. He should be asked first whether he recognizes the knife, and if he answers that he does, then he may be asked where he saw it and what was done with it.

To shorten the court proceedings, leading questions are sometimes allowed. For example, if the accused admits that he was arrested as a deserter on a certain day, at a certain place, by a policeman, the latter may be asked directly whether he arrested the accused on that day and at that place. Leading questions are allowed also when the witness appears hostile to the party who called him, or when the witness makes an erroneous answer, apparently caused by forgetfulness or a slip of the tongue, that a suggestion would set right. Under certain circumstances it is necessary to ask a leading question to enable the witness to better understand what is required. Such an instance may occur when he is called on to contradict a statement made in his absence by another witness.

DOUBLE QUESTIONS

Double questions are not permitted. An example of a double question is: "Did you see the accused with a bundle?" Actually, a *double question is* made up of two separate questions. The first is: "Did you see the accused?" The second is: "Did he have a bundle?"

FORBIDDEN QUESTIONS

A witness is not obligated to answer forbidden questions. Three classes of such questions are:

1. Questions involving state secrets. These include any question detrimental to the public interest, as well as classified military information.

2. Incriminating questions. This group includes questions that make the witness subject to criminal prosecution.

3. Degrading questions. These questions tend to degrade or disgrace the witness. A witness may refuse to answer a degrading question unless it deals with a material issue of the trial.

When a witness protests on the grounds of any of the foregoing forbidden questions, the court rules on whether the witness must answer the question or remain silent. If a witness was tried previously on the matter, and the conviction become final, the claim of privilege is disallowed because there is no further danger.

OPINIONS

It is a general rule that a witness must state facts and not opinions or conclusions. There are three main exceptions to this rule:

1. A witness may testify about opinions in matters based on daily observation and experience. For example, a witness may give an opinion of a person's sanity, sobriety, identity, or resemblance to another. Or a view regarding that person's physical or temperamental condition may be expressed when such an opinion is based on frequent contact with the person in question.

2. Another exception involves a question regarding who wrote or signed a document. Anyone acquainted with the handwriting of the supposed writer may give an opinion about whether it was written or signed by the writer.

3. The opinions of experts in a specialty are admissible in cases requiring a knowledge of such a specialty. Such witnesses must be proven to be actual experts in their line. Physicians, chemists, fingerprint experts, and ballistics specialists are often called as expert witnesses.

NOTES

Ordinarily, a witness whose memory fails on a particular point may be allowed to refer to notes. Thus, a Master-at-Arms normally is allowed to refer to his or her notebook regarding such items as the serial number of a gun, the exact dimensions of rooms, and the like. In such an instance, notes are not evidence; they merely serve to remind the MA of matters that can be testified to from memory.

Notes may be submitted directly as evidence when the witness cannot recall something but is able to testify that an accurate note was made. Both this paragraph and the preceding one point out the necessity for the MA to maintain accurate, complete, and legible notebooks.

VERIFICATION OF TESTIMONY

A witness maybe asked to verify testimony, which may be read to the witness or the witness may read the testimony from a copy of the court record. Then he or she is called before the court to correct, amend, or verify the testimony.

Witnesses are warned not to discuss their testimony with anyone. This warning is given to ensure that the testimony of a witness is not colored by what was heard from another witness. The defense and the prosecution, however, are allowed to discuss the case with their witnesses in advance. When collecting evidence for the prosecution, you may ascertain, through statements, what a witness knows of the case.

WEIGHING EVIDENCE

All evidence and testimony introduced at a trial are considered in reaching a verdict, together with facts of evidence recognized by the court. Such facts fall into three general groups, as follows:

1. The first group includes facts that are common knowledge to every person of ordinary intelligence. For instance, qualities and properties of matter; well-known scientific, geographical, historical, and physiological data; the composition and use of common articles; the character of weapons; time, days, and duties; and the existence, appearance, and value of money are included in this group.

2. Matters that maybe ascertained readily, such as the time of sunrise on a given day.

3. Matters that a court (civil or military) should know as part of its own special function, such as the Constitution, treaties, Federal law, the *UCMJ,* and General Orders.

As stated previously, members of the court may admit any of the aforementioned matters that apply, together with all the evidence introduced. Their knowledge of facts must come to them through the evidence; but, in weighing the evidence given by the various witnesses, members of the court are expected to use common sense, and knowledge of human nature and of the ways of the world. Thus, the court may believe one witness, yet disbelieve several witnesses whose testimony conflicts with that one.

CROSS-EXAMINATION

Cross-examination is intended to test the extent to which the testimony of a witness can be relied upon. An attempt to make a story stand up under cross-examination is difficult, especially when it is not entirely true. Wide latitude is allowed in cross-examination, and leading questions are permitted. If the accused takes the stand, he or she usually is exposed to a searching cross-examination.

SUMMARY

As a Master-at-Arms, you are expected to have the greatest credibility. Your character should never be open to criticism. Develop your power of observation and memory to the fullest extent, and be straightforward in presenting your testimony. You must show no prejudice; your appearance must be smart; and your deportment must be above reproach. At all times, maintain the highest reputation for truthfulness. In this chapter, we have discussed the sources, applicability, and points of interest of the military law of evidence. The forms, types, and admissibility of evidence were also covered. Finally, court proceedings and examination techniques were discussed.